PP

v.

HALIM DIN

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
NH CHAN JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: K-05-71 OF 1997]
22 JUNE 1999

CRIMINAL LAW: *Penal Code - Section 304 - Culpable homicide not amounting to murder - Mens rea - Self defence - Whether defence should have been called on charge of murder - Whether defence of self defence succeeds*

The respondent ('the accused') was charged with murder under s. 302 of the Penal Code ('the Code') but was acquitted and discharged by the High Court judge who found that he had successfully proved the defence of self-defence. The prosecution appealed.

The victim, one Muhiyaluddin Jidun, had been part of an anti-vice team ('the team') from an Islamic religious council which had raided the house the accused was visiting. In trying to escape, the accused, a police inspector, discharged his weapon, killing the victim. The accused's defence was two-fold. Firstly, that he had acted in self-defence, thinking they were local gangsters as he had not heard them identify themselves, and secondly, that the gun had gone off accidentally.

Held:
Per Shaik Daud Ismail JCA

[1] On the totality of the evidence, the accused knew that the team was from a religious council and tried to escape detection. The evidence also showed that he did not fire the shot accidentally, but had intended to shoot anyone who approached him.

[2] Even if the defence of self-defence were plausible, the accused had exceeded the use of reasonable force by using his gun against a man armed with only a piece of wood.

[3] However, at the close of the prosecution's case, the judge should not have called the defence on the charge of murder as the *mens rea* was absent. It was clear that the accused's intention was not to murder but to escape detection and possible apprehension. The judge should have called the defence on an offence of culpable homicide not amounting to murder.

[4] Therefore, the accused should have been convicted under the second limb of s. 304 of the Code. A sentence of two years from the date of conviction was imposed, having regard to his hitherto clean and long record of service in the police force.

[Appeal allowed.]

Legislation referred to:
Penal Code, ss. 32, 80, 96, 97, 98, 99, 100, 302, 304

For the appellant - Ahmad Zaidi Ibrahim
For the respondent - V Sithambaram; M/s Kumar, Sitham & Co

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-1 of 1996]

Reported by Anne Khoo

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is by the Public Prosecutor against an order of acquittal of the respondent for an offence of murder under s. 302 of the Penal Code. The respondent was charged in the High Court at Alor Setar for murder of one Muhiyaludin bin Jidun on 16 November 1995 at about 2.15am at a house No. 778 Lorong Kuda Kepang 4, Taman Ria, Sungai Petani, Kedah. At the close of the defence's case the learned judge held that the respondent had successfully shown that the killing was in self defence and thereby he held that the prosecution had not proved a case beyond reasonable doubt on the charge, and acquitted and discharged the respondent.

The facts of the case are that on 16 November at about 1.45am the deceased Muhiyaludin bin Jidun was a member of an anti-vice team from the Majlis Ugama Islam Kedah which raided house No. 775 Lorong Kuda Kepang 4, Taman Ria, Sungai Petani on suspicion of an offence of khalwat or close proximity, an offence under the Enakmen Kanun Acara Jenayah Syariah 1988.

During the raid, the respondent who was in the house, in trying to avoid detection and capture, climbed onto the roof of the house and jumped down at its rear in the backyard of house No. 777 and then climbed the fence into the area of house No. 778. At this juncture he was heard to say, "siapa rapat saya tembak" and immediately after a shot was fired which shot hit the deceased. The injured Muhiyaludin b. Jidon was taken to Sungai Petani hospital where on 26 December 1995 he succumbed to his injuries. A post mortem examination revealed that he died due to septic peritonitis, DIVC and multiple organ failure on account of his gunshot injuries.

At the close of the prosecution's case the learned judge found that the prosecution had proved its case beyond reasonable doubt, and called upon the respondent to enter his defence as charged. The respondent elected to give evidence on affirmation.

The respondent was, at the time of the alleged offence, an Inspector of Police attached to the Anti Secret Society division of Alor Setar Police, married with two children. Respondent testified that at about 8pm on 15 November 1995 one Cik Fauziah (SP14) phoned him at his office and requested that he help her to transport an exercise equipment from her mother's house in Alor Setar to her house at Taman Ria, Sungai Petani. When he got off duty around 11.30pm he proceeded to Fauziah's mother's house and together with the equipment and Fauziah herself, proceeded to Taman Ria, Sungai Petani. They arrived at her house at about 1am and Fauziah invited him into her house for a drink before he returned to Alor Setar. He complied. While he was in the sitting room he said he heard a commotion at the rear of the house he went to investigate but could not manage to open the rear door. He denied hearing anyone uttering the salam, a number of times and identifying themselves that they were from the Majlis Ugama as testified by the leader of the raiding team SP15 and another witness SP19. Respondent then said that he peeped out of the rear window and saw a number of people armed with wood and changkul. He said that he thought those people were local gangsters intending to harm him. He then locked the rear door from inside and decided to leave the house *via* the air well and onto the roof, which he did and while he was on the roof he heard people below shouting. "Itu dia, itu dia. Mana hang nak lari mana hang nak lari, mampus hang malam ini". He said he ran hither and thither on the roof and finally jumped down into the compound of house No. 777. When he landed he broke his heel but he still ran towards house No. 778 by climbing over a fencing of house No. 777. When he was in the compound of house No. 778, he said two men approached him and pushed him to the fence and a few other men also assaulted him. He tried to avoid the blows and the blows landed on the fence. He said

at that time he felt his life was at stake and he shouted "police, police" a few times. He then pulled his service pistol from his waist with a view to fire warning shots in the air and at the same time shouted "siapa rapat saya tembak". Then the two men acted as if they wanted to wrest the gun from him and at that time "tembakan terlepas" indicating that the shot was fired accidentally. He said he did not aim the gun at anyone nor did he know in which direction the shot went. He repeated that he took out his pistol with a view of giving a warning shot in the air but he did not do this. After the shooting he ran out, not realising the pistol had dropped out of his hand, where he met a police patrol car in which was DSP Abu Shariman, the head of CID of Kuala Muda district and surrendered himself. He said he told DSP Abu Shariman he had lost his pistol.

From the evidence adduced by the respondent, the learned judge came to the finding that the defence had set up a two-fold defence. One is that the shooting was accidental and alternatively he shot in self defence.

After considering the law on accidental acts under s. 80 of the Penal Code, and that of private defence under s. 96 to s. 100 of the Penal Code, the learned judge made several findings of fact on the totallity of the evidence.

Firstly he held that he could not accept the respondent's evidence that he did not hear the salams and then identifying themselves by SP15, as even SP19 who was at the rear of the house heard this a *fortiori* the respondent who was at the front of the house.

Secondly he held that he could not accept that the respondent did not know that those people who came were from the Majlis Ugama, as SP15 identified himself several times and this was again heard by SP19 who was at the rear of the house.

Thirdly he held that he could not accept that as the respondent said he thought those people outside the house were gangsters coming to harm him, firstly no one except Fauziah and respondent himself knew he would be in Fauziah's house at that time, and secondly he was stationed in Alor Setar and not in Sungai Petani and also as a police officer he must know that if they were gangsters they would not come in that manner by arousing everybody's attention. Furthermore if he harboured that thought surely he would have immediately reported to DSP Abu Shariman in the patrol car, which he did not. He merely mentioned that he had lost his pistol.

After going through the evidence, we agree with the findings of the learned judge. We are equally of the view that on the totality of the evidence, the respondent knew that those people who came to the house that night were from the Majlis Ugama making a raid on the house and as he was unable to explain his presence in Fauziah's house at that hour of the night, he chose to escape *via* the roof, in order to escape detection, especially that he was a police officer. We also agree with the learned judge's finding that the respondent did not fire the shot accidentally during the time the two men allegedly tried to wrest the gun from him, because firstly he could have fired a shot in the air as a warning and secondly there is evidence that just before the shooting, respondent was separated from the alleged men by the fence. In fact, respondent did testify that the blows towards him landed on the fence and photographs of the fencing showed the part where the blows landed as the fence was bent backwards. Furthermore at that point of time respondent was on a higher ground than those men.

On the evidence available, we are of the view that at the close of the prosecution's case, the learned judge should not have called the defence on the charge of murder as it is pretty obvious that the most important ingredient of murder *ie, mens rea,* was absent. There was absolutely no evidence at all that the respondent intended to murder anyone. His sole intention was to escape detection and possible apprehension. We are of the view that the learned judge ought to have called the defence on an offence of culpable homicide not amounting to murder. After carefully reviewing the whole of the evidence, we are of the view that the alternative defence of private defence cannot hold water. As mentioned earlier, the respondent knew those people who came to the house that night were from Majlis Ugama. His testimony that he thought they were gangsters has no substance. His actions after knowing of the presence of those people around the house clearly indicated that he knew who they were and tried his best to escape detection and possible arrest (and indictment) for the offence of close proximity. That is why he tried to escape. If as he said he thought they were gangsters he would have dealt with them by using his pistol even while still in the house. Since he knew who those people were, there was no justification for him to use the pistol in the manner it was used. It is obvious that he did not intend merely to give a warning shot in the air as he testified because he did utter "siapa rapat saya tembak". This clearly indicated to us that he in fact intended to shoot anyone who approached him. In fact he did open fire towards those two men as such the defence of self-defence cannot be accepted as reasonable, and even if it is self defence (which we say is not) we feel that he has exceeded his right of self defence since one of those men was only armed with a piece of wood, and being separated by a fence, could not be a danger to his life.

In the circumstances, we are unanimously of the view that the respondent ought to have been convicted under s. 304 (2nd limb) of the Penal Code. We, therefore, allowed the appeal of the Public Prosecutor, and convicted the respondent under s. 304 (2nd limb) of the Penal Code.

As for sentence, we have taken into consideration the period he was in custody during the trial for an offence of murder, and also his hitherto clean and long records of service in the police force. We think that a sentence of two years from the date of conviction was an appropriate one. On the application of the respondent we also allowed bail pending appeal in the sum of RM10,000 with one surety.